

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B4

MAY 06 2004

FILE: WAC 02 179 50678 Office: CALIFORNIA SERVICE CENTER Date:

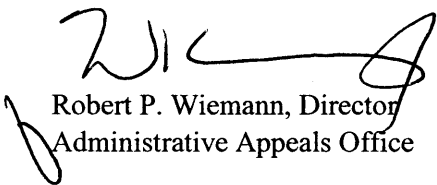
IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation that was organized in the State of California in November 2000. It operates a cleaning service. It seeks to employ the beneficiary as its president and general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that: (1) the beneficiary would be employed in a managerial or executive capacity for the United States entity; or, (2) a qualifying relationship existed with the beneficiary's foreign employer.

On appeal, counsel for the petitioner asserts that the director erred in his determination.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means an assignment within an organization in which the employee primarily

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term “executive capacity” means an assignment within an organization in which the employee primarily

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Counsel for the petitioner stated that the beneficiary would “continue to be in control of the overall operations of the business and arrange for the strategy and conduct of the business.” Counsel added that the beneficiary would hire and train managers who, in turn, would train subordinate workers in the business; would coordinate and direct the activities of the managers/supervisors; and, would be in control of the strategy of the

business and expansion. The petitioner's claimed affiliated company stated that the beneficiary's responsibilities included:

- ?? Plan for business development and diversification to new markets
- ?? Conceptualize new marketing tools for business expansion
- ?? Evaluate payroll costs and determine guidelines to enforce efficiency
- ?? Bid for office contracts
- ?? Keep track of attrition rates
- ?? Analyze financial data monthly
- ?? Hire and terminate personnel as necessary
- ?? Report directly to the Board of Directors in Manila

The petitioner also provided its organizational chart showing the beneficiary as president. The chart showed the beneficiary supervising an operations manager who, in turn, supervised three cleaning contractors and a housecleaning supervisor who, in turn, supervised three two-employee housecleaning teams.

The director requested that the petitioner provide an organizational chart listing all employees under the beneficiary's supervision by name, job title and description, educational level, and annual salaries. The director also requested the petitioner's California Form DE-6, Employer's Quarterly Wage Report for the first and second quarters of 2002.

In response, the petitioner provided a revised organizational chart showing one less "cleaner" and revealing that the individuals in some positions had been replaced. The petitioner stated that the operations manager's duties included collecting and depositing checks, calculating sales, distributing keys, booking appointments, scheduling housecleaners, maintaining inventory, conducting interviews with prospective employees, preparing payroll, sorting mail, settling account payables and monitoring receivables, and handling customer service issues. The petitioner stated that the housecleaning supervisor was in charge of training new employees, monitoring quality of work and adherence to cleaning standards, assisting the operations manager with hiring, enforcing time management, evaluating performance of housecleaners, providing estimates, and standing in for absent housekeepers.

The petitioner also provided its California Form DE-6 for the quarter in which the petition was filed. The California Form DE-6 showed the petitioner employed nine individuals in April 2002, seven individuals in May 2002, and six individuals in June 2002. The individuals on the California Form DE-6 corresponded with the petitioner's original organizational chart.

The director determined that:

- (1) The petitioner's type of business did not require or have a reasonable need for an executive, observing that the petitioner's business did not possess the organizational complexity to warrant having such an employee;
- (2) The description of the beneficiary's duties was vague and general and did not convey an understanding of the beneficiary's daily duties;

- (3) It was reasonable to believe that with the petitioner's organizational structure and its type of business, the beneficiary would be assisting in day-to-day non-supervisory duties;
- (4) The beneficiary was, in essence, a first-line manager of non-professional and non-managerial employees; and,
- (5) The petitioner had not established that the beneficiary managed an essential function.

On appeal, counsel for the petitioner asserts that the beneficiary: (1) directs the management of the company because she is the primary decision-maker regarding expenditures and that she controls the operation by means of finance and personnel; (2) establishes goals and policies for marketing and sales; (3) has been given the power to exercise wide latitude in discretionary decision-making in regard to finances, expenditures, personnel, marketing, and contracts; (4) reports only to the board of directors in Manila, receiving minimum supervision from this group. Counsel contends that a housecleaning business with a multi-tiered structure, like the petitioner, has a reasonable need for at least one executive.

Counsel asserts that the beneficiary has delegated supervision of lower-level employees to those individuals she supervises. Counsel contends that the beneficiary does not assist in performing housecleaning services and that the petitioner employs supervisors who perform the petitioner's management, administrative, and human resource functions. Counsel also claims that the beneficiary supervises a professional employee. Counsel observes that the petitioner's operation manager holds a bachelor's degree and that this is a minimum requirement for entry into the position of operation manager for other cleaning companies. Counsel attaches internet job postings for the position of "operation manager" within the housecleaning industry. The internet job positions require applicants to hold a bachelor's degree.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner's claimed affiliated company has provided a general description of the beneficiary's duties. The description indicates that the beneficiary is responsible for bidding on new contracts and conceptualizing new marketing tools. This description suggests that the beneficiary is involved in selling and marketing the company's housecleaning services. The petitioner does not provide evidence of other employees performing these operational tasks. The beneficiary also analyzes the financial data and attrition rates and evaluates payroll costs. The petitioner does not indicate who in the company performs these accounting tasks, other than the beneficiary. The petitioner has not established that these tasks are primarily executive or managerial tasks, rather than tasks associated with the daily operation of the company. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Moreover, the petitioner has failed to establish clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary.

Although the record supports counsel's assertion that the beneficiary has delegated supervision of lower-level employees to two supervisors, counsel and the petitioner do not detail the amount of time the beneficiary spends supervising these two employees. The record does not provide any information regarding the

percentage of time the beneficiary actually performs or will perform the claimed supervisory duties or will perform the claimed executive duties. As stated in the statute, the beneficiary must be performing duties that are primarily managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. The petitioner bears the burden of documenting what proportion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

Counsel's assertion that the beneficiary supervises a professional employee is also not persuasive. Although the petitioner's operation manager possesses a bachelor degree, the description of the operation manager's tasks does not support a conclusion that this position is a professional position. The operation manager's tasks do not involve knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level. Moreover, the operation manager's degree in economics is not a realistic prerequisite to entry into the position of operation manager for a small housecleaning company. See *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Counsel correctly notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, when examining the description of the beneficiary and her subordinates' duties, it is not possible to conclude that the beneficiary's assignment would involve primarily executive or managerial duties rather than involve the performance of the daily operational tasks of the organization. The petitioner has not provided sufficient evidence to overcome the director's decision on this issue.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint

venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

The director observed that five individuals owned varying interests in the petitioner as shown by the petitioner's stock certificates and stock ledger. The director also noted that the same individuals owned similar percentages in the beneficiary's overseas employer. The director, however, questioned whether the five individuals had actually purchased their interest in the petitioner. The director noted that the petitioner's California Notice of Transaction showed that \$50,000 in money was paid for the 50,000 shares that the petitioner had issued. The director also noted that the petitioner's minutes of its incorporating meeting established the share value at \$1.00 per share. However, the petitioner's 2000 and 2001 Internal Revenue Service Forms (IRS) 1120, U.S. Corporation Income Tax Return, on Schedule L, Line 22(b) show the value of the corporation's stock is \$5,000.

In addition, the AAO observes that the wire transfer of \$46,077.18 proffered by the petitioner as evidence to support the purchase of the various interests in the petitioner is dated in April 2001 and that the petitioner's stock was issued in January 2001. Further, the originator on the wire transfer is listed as the beneficiary's overseas employer, not the five individuals who purportedly own the petitioner's stock.

As the director states, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Counsel does not explain or otherwise resolve these inconsistencies on appeal. The record does not contain sufficient consistent evidence to overcome the director's determination on this issue.

Beyond the decision of the director, the petitioner has provided a brief description of the beneficiary's duties for the foreign entity. The description is not sufficient to establish that the beneficiary was employed by the foreign entity for one year in a managerial or executive position prior to entering the United States as a nonimmigrant. For this additional reason the petition will not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.